No. 97-282

In The

Supreme Court of the United States

October Term, 1997

BETH ANN FARAGHER

Petitioner,

v.

THE CITY OF BOCA RATON, a political subdivision of the State of Florida

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF AMICUS CURIAE OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The National Employment Lawyers Association (NELA) is a voluntary membership organization of over 3,000 lawyers who regularly represent employees in labor, employment, and civil rights disputes. NELA is one of the largest organizations in the United States whose members litigate and counsel individuals, employees, and applicants on claims arising out of the workplace. As part of its advocacy efforts, NELA has filed numerous amicus curiae briefs before this Court, singly or jointly with other amici. Some recent cases include *Oncale v. Sundowner Offshore Services, Inc.*, No. 96-568 (1997); *Oubre v. Entergy Operations, Inc.*, 117 S.Ct. 1466 (1997); *Robinson v. Shell Oil Co.*, 117 S.Ct. 843 (1997); *O'Connor v. Consolidated Coin Caterers Corp.*, 116 S.Ct. 1307 (1996); *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993); and *Hazen Paper Co. v. Biggins*, 508 U.S. 948 (1993).

NELA members represent thousands of individuals in this country who are victims of unlawful employment discrimination, including sexual and racial harassment. Both before and since this Court's opinion in *Meritor Savings v. Vinson*, 477 U.S. 57 (1986), courts have struggled to articulate the circumstances under which an

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[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. With the exception of the fact that counsel for petitioner, William R. Amlong, is a member of NELA and, as such, pays general membership dues, no persons other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

employer is liable for conduct that rises to the level of actionable sexual harassment.

The interest of NELA in this case is to protect the rights of its members' clients, by ensuring that Title VII's goal of eradicating employment discrimination is fully realized. This cannot happen when the victims of unlawful conduct inflicted by supervisors are largely left without remedy. NELA submits this brief because of the importanee of the issues at bar to furthering its goals.

INTRODUCTION

In NELA's view this case presents two important questions. First, when is an employer vicariously liable for sexual harassment by one of its supervisors? Second, when is an employer directly liable for sexual harassment by a supervisor because it is on notice that the harassment is occurring and has failed to take corrective action?[2]

When first considering the question of employer liability for sexual harassment conducted by supervisory personnel, this Court, in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), rejected two opposing contentions. First, it stated that employers are not always automatically liable for sexual harassment of an employee by her

[2] The issues of *quid pro quo* sexual harassment or non-supervisorial co-employee work environment harassment was not addressed in this brief.

supervisor. Second, it held that "absence of notice to an employer . . . does not necessarily insulate that employer from liability." *Id*. at 72. Instead, this Court referred parties and courts to the Restatement (Second) of Agency ("the Restatement"), which employs a number of tests for determining whether an employer is liable for the acts of its supervisors, and its employees in general. The Court cited Section 219 of the Restatement, which provides:

> (1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment;
>
> (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
>
> (a) the master intended the conduct or the consequences, or
>
> (b) the master was negligent or reckless, or
>
> (c) the conduct violated a non-delegable duty of the master, or
>
> (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

Courts on both the trial and appellate levels are in disarray about which, if any, of these principles should be applied in hostile work environment cases, particularly when the harasser is the victim's supervisor. They have thus rendered confusing and inconsistent decisions interpreting an employer's liability for sexual harassment by a

supervisor. David Oppenheimer, *Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed by Their Supervisors*, 81 Cornell L. Rev. 66, 72 (1995) (hereafter, *Oppenheimer, "Title VII Liability"*). This disarray has led to decisions in which the victims of sexual harassment have no effective recourse and their employers have no incentive to change their conduct. These decisions not only misapply the law of agency, but also operate to deprive employees of their statutory rights.

The decision of the court of appeals in the case at bar creates an insurmountable barrier for individuals whose supervisors sexually harass them in the workplace, while thus absolving employers of their responsibilities to safeguard the workplace from discriminatory conduct. By misapplying well-accepted agency principles, the rule announced by the appellate court rewards employers who delegate broad authority to supervisors but then neither act proactively to prevent sexual harassment by clearly communicating its intolerance of that conduct nor properly supervise its managers. The appellate court would instead predicate employer liability on the employees' ability to run the gauntlet of seeking out and complaining to a variety of management officials about the sexual harassment by their supervisors. This rule does not further the goals of Title VII, but instead closes the doors of relief to many sexual harassment victims and removes an incentive to an employer to prevent and eradicate a sexually hostile work environment: the threat of corporate liability. Under the Eleventh Circuit's standard, employers with supervisors who perpetuate the existence of offensive language, gestures, touching and

other illegal conduct in the workplace avoid liability altogether.

NELA believes that this Court's application of generally accepted agency principles in cases involving hostile work environment sexual harassment by supervisors will end the confusion. The tests NELA sets forth below, if adopted by this Court, serve Congress' twin goals of (1) deterring sexual harassment and (2) compensating victims of this illegal conduct. (Civil Rights Act of 1991, P.L. 102-166 H. Rep. (Education and Labor Committee) No. 102-40 pages 14, 64-69 (April 24, 1991)).

NELA recognizes that many, if not most, employers covered by Title VII have written policies prohibiting discrimination in general and sexual harassment in particular. Despite these policies, illegal harassment in the workplace has not been abolished. The mere existence of such a written policy should not immunize the employer for acts of supervisory harassment, but is relevant evidence for at least four reasons:

(1) It reduces the likelihood that harassment will occur;

(2) It increases the likelihood that harassment will be reported;

(3) It may reduce the availability of punitive damages; and

(4) It reduces the likelihood of a finding of constructive notice.

By contrast, the absence of a meaningful anti-harassment policy is relevant evidence of the employer's own carelessness and recklessness. How that anti-harassment policy is crafted, how it is disseminated, whether

distribution of the policy is accompanied by adequate training and how it is implemented in real life, day in and day out in a particular workplace, are all questions of fact, the importance of which depend on the facts of each case.

Amicus NELA advocates a middle ground between (1) the argument that employers are always automatically liable for sexual harassment committed by supervisors and (2) the argument that employers are liable for supervisory sexual harassment only if it is brought to the attention of "higher management" other than the perpetrator. NELA's proposal is pragmatic, realistic, workable, and based upon time-honored common law agency principles.

SUMMARY OF ARGUMENT

NELA urges this Court to hold that under principles of the law of agency, employers may be vicariously liable for hostile work environment sexual harassment perpetrated by their supervisors. Under respondeat superior, employers should be held responsible for harassment by supervisors when committed within the supervisors' scope of employment. Employers should also be held responsible when the employer/supervisor relationship aided the supervisor in carrying out the harassment or the supervisor acted with apparent authority.

Should a supervisor's sexual harassment of a subordinate be within the scope of his employment, the employer is, without exception, liable for that conduct. Similarly, employers are vicariously liable for sexual

harassment by their supervisors should the supervisor have the apparent authority to engage in the conduct, or should he be aided in the harassment by the existence of the agency relationship.

Amicus further urges this Court to hold that employers are directly liable for work environment sexual harassment when they are careless, reckless or at "fault." The most common form of direct employer fault in the sexual harassment context is its failure to take appropriate corrective action when it knows, or should know, that harassment is occurring.

The proper application of agency principles to this case result in a conclusion that the City of Boca Raton is liable for the sexual harassment endured by Faragher under three different theories of agency. First, Terry himself was vested with sufficient authority that his sexual harassment was within the scope of his employment. Second, Terry and Silverman were acting within the scope of their apparent authority. And, finally, even though the victims did not complain to someone in "higher management," they complained to a supervisor with sufficient authority such that his notice is properly imputed to the employer and, having thereafter failed to take prompt remedial action, the employer is liable for its own carelessness or recklessness.

I. AN EMPLOYER MAY, UNDER PROPER CIRCUMSTANCES, BE VICARIOUSLY LIABLE FOR SUPERVISORY HARASSMENT

The appeals court held that there can be no vicarious liability for a supervisor's sexual harassment of a subordinate, unless the victim takes her complaint to higher management. While the appellate court did not identify what person or title would qualify as higher management under the facts of this case, it obviously required that the individual be someone above the harassing supervisors. Based on the application of traditional agency principles the appellate court's ruling is erroneous.

In understanding the modern law of agency, there is no better starting place than the American Law Institute's Restatement (Second) of Agency, published in 1957. The Restatement's section on respondeat superior provides that "A master is subject to liability for the torts of his servants committed while acting in the scope of their employment." Restatement 219(1). Even when the supervisory harasser acts outside the scope of his employment, the master is liable if "the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation." Restatement 219(2)(d).

Given the degree of authority that workplace supervisors have in our society, the risk that such an individual will abuse his position of power over a subordinate and subject her to unlawful conduct appropriately falls on the employer when the harasser has acted within the scope of his employment or when he acts with apparent authority.

A. EMPLOYERS ARE VICARIOUSLY RESPONSIBLE FOR SEXUAL HARASSMENT BY THEIR SUPERVISORS WHO ACT WITHIN THE SCOPE OF THEIR EMPLOYMENT.

Most fundamentally, an employer is liable for its own acts of discrimination and harassment. "Since the acts of a corporation are acts of human beings, to say that the corporation has committed some wrong . . . simply means that someone at the decision-making level in the corporate hierarchy has committed the wrong." *Hunter v. Allis Chalmers Corp.*, 797 F.2d 1417, 1422 (7th Cir. 1987). Marine Safety Chief Terry constitutes such a person because his sexual harassment was within the scope of his employment.

This raises one of the most difficult issues in the application of agency law to sexual harassment – when is an employee who harasses another employee acting within the scope of employment? In the case at bar, the majority in the *en banc* decision ruled that harassment is within the scope of employment only when it is "authorized" by the employer – that is, when the employer has directed employees to engage in harassment or given them permission to do so. This is clearly wrong, because it is well established in the law of agency that unauthorized acts, and even forbidden and illegal acts, may be within the scope of employment. Restatement (Second) of Agency (1957) Sections 230, 231; *Ira S. Bushey v. United States*, 398 F.2d 167 (2d Cir. 1968) (Friendly J) *Lyon v. Carey*, 533 F.2d 649 (D.C.Cir. 1976). A principled application of the law of agency requires a holding that, when the employer vests a supervisor with significant

control over the plaintiff's hiring, firing, or conditions of employment, the employer is liable for that conduct.

In answering the "scope of employment question," judicial notice must be given to the breadth of delegated authority in a modern workplace. Employers act through their supervisors. They are the eyes, ears, and, most importantly, the voice of the employer in all interactions with employees. They give instructions, oversee operations, direct the activities of their subordinates, provide and interpret regulations, and mediate interactions between employees. And, although not true of all supervisors, many are in charge of large numbers of employees, and are given autonomy in controlling the work environment of their subordinates. As a result, a determination of whether an act took place in the scope of employment requires a searching examination of the supervisor's authority over the plaintiff, the overall structure of the workplace, and when and where the acts took place. *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1351 (4th Cir. 1995).

In this case, Marine Safety Section Chief Terry ran the unit with great autonomy and independence from City Hall and it was in this unit that, in the District Court's finding, he promoted "an environment where female lifeguards were considered fair game for uninvited touching and offensive remarks." (Dist. Ct. Op. App. 89a) Terry was the "decision-maker" insofar as the lifeguards were concerned. Terry wielded the power to encourage or prevent the harassment of Faragher and the other women under his command. He held the authority to supervise

all aspects of their work assignments, to control the lifeguards' daily duties, including designating work assignments and supervising physical fitness routines, to give oral reprimands and place disciplinary actions in personnel files, and to interview and select new lifeguards. (Dist. Ct. Op. App. 92a-93a). While theoretically he was required to obtain higher management's approval of his hiring decisions, no one was hired without Terry's recommendation during the 20 years that Terry was Marine Safety Chief.(This is precisely the type of empirical fact that is uncovered by a searching exam of the real life functioning of this city which is the methodology NELA advocates.) On these facts, the City of Boca Raton must be held vicariously liable for Terry's harassment of Faragher. The level of autonomous control that Terry exercised over Faragher's conditions of employment proves that his acts of offensive grabbing and touching and other demeaning conduct were within the scope of his employment.

B. EMPLOYERS MAY ALSO BE VICARIOUSLY LIABLE WHEN THE HARASSMENT IS OUTSIDE THE SCOPE OF THE HARASSER'S EMPLOYMENT

Even when the sexual harassment does not fall within the scope of the harasser's employment, Restatement 219(2) provides that the employer may be liable for the harasser's conduct. Subsection (d) of Section 219 provides that an employer is liable for the conduct of its servant, even though acting outside the scope of employment, if "the servant purported to act or to speak on behalf of the principal and there was reliance upon

apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation."

This particular rule of vicarious liability is particularly applicable in the sexual harassment context:

> Given the process by which harassment occurs in the workplace, the supervisor's opportunity to engage in sexual harassment necessarily arises from the existence of the agency relationship. Certainly, from the employee's point of view, the supervisor's ability to harass her arises precisely because the agency relationship affords her supervisor the authority to call her into his presence, to retain her in his presence over her objections, to place her in a compromising position, and to a large extent encroach upon her personal privacy. Harassment occurs when there is an imbalance of power in the workplace – an imbalance arising from a relationship in which the supervisor, empowered by the principal, oversees the disempowered subordinate employee (footnote omitted). Even when the harassment is unrelated to job functions, the level of trust and authority conferred upon the supervisor by the employer affords the supervisor the opportunities denied other employees or strangers. When the supervisor abuses that trust and authority, by harassing a subordinate, the law of vicarious liability holds the employer responsible.

Oppenheimer, "Title VII Liability", supra, at pp. 89-90

Whether the supervisor possessed the apparent authority to carry out the acts of sexual harassment is a question of fact. Several appellate courts, recognizing the doctrine of vicarious liability, have held that an employer

may be liable, under traditional agency principles, for sexual harassment committed by a supervisor who had the apparent authority to commit the harassment. *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1347 (10th Cir. 1997) (underground shift foreman was plaintiff's supervisor, had authority to order her into particular areas of the mine, and was involved in the disciplinary process); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1306 (2d Cir. 1995) (supervisor convened business dinner and implied that employees were required to attend; supervisor then fostered alcohol consumption at the dinner, which led to sexual assault); *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 185-186 (6th Cir. 1992) (supervisor told plaintiff that she "owed him" for all that he had done for her as her supervisor, and varied "her raises, hours, autonomy and flexibility" according to her responsiveness to his sexual advances); *Paroline v. Unisys Corp.*, 879 F.2d 100, 104 (4th Cir. 1989), vacated in part, 900 F.2d 27 (4th Cir. 1990).

Applying this agency principle, the City of Boca Raton is vicariously liable for Faragher's sexual harassment because Terry and Silverman had apparent authority to conduct their acts of harassment. Silverman was encouraged in his behavior by the example set by Terry. And, Gordon warned Faragher that the City would not care if complaints were made to anyone above Terry's head. This is what Professor Oppenheimer meant when he said "certainly from the employee's point of view, the supervisor's ability to harass . . . arises precisely because of: the agency relationship. . . . " (*Oppenheimer, Title VII Liability* at 89)

C. CONGRESSIONAL INTENT AND PUBLIC POLICY SUPPORT THE APPLICATION OF VICARIOUS LIABILITY TO SEXUAL HARASSMENT BY SUPERVISORS

Under the modern view of respondeat superior, there are three principal reasons for imposing vicarious liability: deterrence, compensation, and risk spreading. Each goal is furthered by a rule that imposes vicarious liability on employers when their supervisors harass subordinate employees while acting in the scope of their employment. Such a rule clearly aids the goal of deterrence; employers who know they will be vicariously liable for sexual harassment committed by their supervisors will be motivated to develop and implement effective anti-harassment policies. They will have a meaningful incentive to take all reasonable steps to prevent harassment from occurring.

A rule of vicarious liability also furthers the goal of compensation for harm, which the Congress added to Title VII in the 1991 Civil Rights Act. This is particularly true since every Circuit, except the First, has held that there is no individual liability under Title VII. *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1313 (2d Cir. 1995); *Sheridan v. E.I. DuPont de Nemours and Co.*, 100 F.3d 1061 (3d Cir. 1996); *Dici v. Com. of Pa.*, 91 F.3d 542, 552 (3d Cir. 1996); *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 512 (4th Cir.), *cert denied*, 513 U.S. 1058, 115 S.Ct. 666, 130 L.Ed.2d 600 (1994); *Grant v. Lone Star Co.*, 21 F.3d 649, 653 (5th Cir.), *cert denied*, 513 U.S. 1015, 115 S.Ct. 574, 130 L.Ed. 2d (1994); *Wathen v. General Electric Co.*, 115 F.3d 400, 405 (6th Cir. 1997); *Williams v. Banning*, 72 F.3d 552 (7th Cir. 1995); *Bonomolo-Hagen v. Clay Central-Everly Community School Dist.*, 1997 WL 467573 (8th Cir. 1997); *Miller v. Maxwell's Int'l Inc.*, 991 F.2d 583, 587-88 (9th Cir. 1993), *cert denied*, 510 U.S. 1109, 114 S.Ct. 1049, 127 L.Ed.2d 372 (1994); *Haynes v. Williams*, 88 F.3d 898, 900 (10th Cir. 1996); *Smith v. Lomax*, 45 F.3d 402, 405 (11th Cir. 1995); *Gary v. Long*, 59 F.3d 1391, 1399 (D.C. Cir.), *cert denied*, ___ U.S. ___,116 S.Ct. 569, 133 L.Ed.2d 493 (1995). The First Circuit has declined to answer the question, describing the issue of individual liability under Title VII as "potentially difficult." *Margarita Serapion v. Fred H. Martinez*, 1997 WL 394605 (1st Cir. 1997); *Morrison v. Mills*, 108 F.3d 429, 1st Cir. 1997).

Congress did not intend that employees whose civil rights are violated be left without a remedy. Congress enacted the Civil Rights Act of 1991 in part to provide monetary remedies for employees who have been damaged by discrimination, to compensate them for resulting injuries and to deter discrimination. Congress recognized that Title VII, prior to the enactment of the Civil Rights Act of 1991, forced the victims of harassment rather than the perpetrators of the harassment to bear the non-wage costs of discrimination. Congress believed that, by making employers liable for all losses, it would serve as a necessary deterrent to future acts of discrimination and encourage employers to design and implement remedies for intervention and prevention. (Civil Rights Act of 1991, P.L. 102-166 H. Rep. (Education and Labor Committee) No. 102-40 pages 14, 64-69 (April 24, 1991)).

A rule of vicarious liability, such as advocated by NELA imposes the burden of risk spreading to the party best able to spread the risks; if the risks posed by sexual harassment are borne by victims alone, they will be borne

by those least able to spread the risk. If they are borne by employers they may be shifted more broadly in the marketplace to customers, clients and owners.

As a comment to the Restatement explains: "It would be unfair for an enterprise to have the benefit of the work of its agents without making it responsible to some extent for their excesses and failures to act carefully. The answer of the common law has been the creation of special agency powers or, to phrase it otherwise, "the imposition of liability upon the principal because of unauthorized or negligent acts of his servants and other agents." Restatement, Section 8A, cmt. a. A rule of vicarious liability protects employees and encourages employers to take all prudent steps to reduce the likelihood that harassment will occur, and to insure or self-insure against the inevitable cases in which their efforts are insufficient.

II. AN EMPLOYER IS DIRECTLY RESPONSIBLE WHEN IT FAILS TO PROTECT EMPLOYEES FROM SEXUAL HARASSMENT OF WHICH IT HAS ACTUAL OR CONSTRUCTIVE KNOWLEDGE.

In addition to these situations in which the employer can be found to be liable regardless of its lack of knowledge, an employer may also be held responsible for its own conduct in failing to prevent or timely stop the harassment. *See*, generally, David Oppenheimer, *Negligent Discrimination*, 141 U.Pa.L.Rev. 899, 944-67 (1993). Many courts refer to this as the employer's "direct liability" – and the applicability of this principle of employer liability is one upon which the circuits generally agree. *See*,

e.g., Jansen v. Packaging Corp. of Am., 123 F.3d 490, 510 (7th Cir. 1997) (and cases cited therein); *Hirschfeld v. New Mexico Corrections Dept.*, 916 F.2d 572, 577 (10th Cir. 1990); *Saxton v. Am. Tel. & Tele. Co.*, 10 F.3d 526, 535 (7th Cir. 1993).

Under this principle of agency, articulated in Restatement 219(2)(b), an employer is held liable if it has either actual or constructive notice[3] of the harassment, yet fails to take prompt remedial action to stop harassment in its tracks. *See, e.g., Hirschfeld v. New Mexico Corrections Department*, 916 F.2d 572, 577 (10th Cir. 1990). This principle dovetails Title VII's requirement that an employer protect employees from racial, ethnic, religious or sexual harassment of which the employer has notice. *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972); *DeGrace v. Rumsfeld*, 614 F.2d 796 (1st Cir. 1980); *Katz v Dole*, 709 F.2d 251 (4th Cir. 1983). *See also*, Restatement (Second) of Agency (1957) Sections 507 (employers' duty to provide competent supervisors); 508 (duty to make and enforce rules); 213 (employers' duty to

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[3] There are various means by which constructive notice can be proved. If, for example, the sexual harassment was open and obvious and should have therefore been observed by the agent, there is constructive notice. Alternatively, if the agent knew that the supervisor had a tendency to behave obnoxiously and abuse other employees there is constructive notice. Or, if the harassment would have been discovered by the exercise of reasonable management skills, again there will be constructive notice. The existence of an effective anti-harassment policy may help defeat a claim of constructive notice while the lack of an effective policy may be evidence of constructive notice.

third persons to give proper orders, make proper regulations, select and employ appropriate persons, and select and supervise employees with due care).

The question, though, becomes, *whose* knowledge is properly attributed to the employer, such that a failure to act properly after the receipt of that information leads to the employer's liability? One method the Restatement articulates for proving employer liability is:

> (1) Unless the notifier has notice that the agent has an interest adverse to the principal, a notification given to an agent is notice to the principal if it is given:
>
> (a) to an agent authorized to receive it;
>
> (b) to an agent apparently authorized to receive it;
>
> (c) to an agent authorized to conduct a transaction, with respect to matters connected with it as to which notice is usually given to such an agent, unless the one giving the notification has notice that the agent is not authorized to receive it;

Restatement Section 268. *See*, also, Restatement Section 496 (notice to a supervisor of a dangerous condition constitutes notice to the employer).

This question was addressed in *Young v. Bayer Corporation*, 123 F.3d 672 (7th Cir. 1997) (Posner, C.J.). Rather than approaching this issue by asking at what level in a corporate hierarchy an employee "is" the corporation, the Seventh Circuit focused instead on a more practical question: did the information come to the attention of "someone who ought by specification of his duties or, failing

tnat, general norms of management to do something about it, either directly or by referring the matter to some other corporate employee?" Citing an earlier 2nd Circuit opinion in *Torres v. Pisano*, 116 F.3d 625 (2d Cir. 1997), Chief Judge Posner held that the court's ruling – the information must either:

> (1) come to the attention of someone who
>
> (a) has under the terms of his employment, or
>
> (b) is reasonably believed to have, or
>
> (c) is reasonably charged by law with having, a duty to pass on the information to someone within the company who has the power to do something about it; or
>
> (2) come to the attention of such a someone.

123 F.3d at ___ (citations omitted).

Here the question of whether the employer has justly implemented throughout the workplace an effective anti-harassment policy is relevant. Employers that have well crafted, fully implemented anti-harassment policies should have many fewer harassed employees who claim not to know to whom they complain, or mid-level supervisors who claim they do not know where to take such complaints. Therefore, the failure to have an effective anti-harassment policy may itself be strong evidence of the employer's recklessness and a complaint to any supervisor would be sufficient to establish actual notice.

Or, as Professional Oppenheimer has written, "agency law should impose direct liability when an employer: (1) unreasonably fails to instruct its employees

to refrain from sexual harassment; (2) unreasonably fails to adopt rules, policies, and regulations designed to prevent harassment from occurring; (3) unreasonably employs people it knows or should know to be engaged in sexual harassment of other employees; (4) fails to properly supervise its employees to prevent harassment from occurring; (5) stands by and does nothing when it knows, or should know, that harassment is occurring; or (6) fails to prevent harassment that it could have reasonably prevented. In such cases the law of master and servant holds the employer directly liable for the harm caused by the employer's breach of duty." Oppenheimer, *Title VII Liability* at 98.

In the case now before the Court, the City's carelessness is established by the fact that notice of illegal harassment was given to an agent of the employer who was obligated to do something to ensure that the harassment stopped. He did nothing, and the employer therefore is directly liable. Training Captain Robert Gordon had actual knowledge that the female lifeguards, including the plaintiff Faragher, were suffering from Terry's and Silverman's sexual harassment. (Dist. Ct. Op. App. 82(a) of the cert. petition). Although Capt. Gordon was not in their chain of command, common sense and elementary management principles dictate that he report the harassment to someone who could end the harassment. While Gordon testified that he did not feel that it was his place to pass complaints on to his superiors, his failure to carry out his responsibilities does not immunize his employer from liability. If it did, employers would be encouraged to hire supervisors, who neglected their duties and abandoned their post – in a word, were incompetent. NELA

thus urges that the City of Boca Raton be held directly liable for its own recklessness by failing to take prompt remedial action once the lifeguards complained to Capt. Gordon that they were being sexually harassed.

CONCLUSION

In the twelve years since this Court's decision in *Meritor,* the lower courts have struggled to properly apply the law of agency to the problem of harassment in the workplace. This Court should cure the confusion by adopting a pragmatic, realistic, workable approach to the problem based upon time honored common law agency principles.

Respectfully submitted,

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